BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LARNARD E. SMITH	)	
Claimant	)	
	)	
VS.	)	
	)	
LARNARD SMITH INSURANCE	)	
Respondent	)	Docket No. 1,013,906
	)	
AND	)	
	)	
COMMERCIAL UNION INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) requests review of the September 13, 2004 preliminary hearing Order entered by Administrative Law Judge (ALJ) John D. Clark.

ISSUES

The ALJ entered a preliminary hearing order specifically finding claimant was injured in an accident that arose out of and in the course of employment with respondent. He went on to authorize Dr. Shane T. Fejfar to serve as the claimant's treating physician, and ordered "[a]ll medical" to be paid.[1]

The respondent requests review of this preliminary hearing Order and advances three arguments in support of its contention that the Order should be reversed. Respondent first argues that "claimant's injury did not arise out of and in the course of his employment with respondent."[2] Although not specifically articulated in its brief, it appears

[1] ALJ Order (September 13, 2004).

[2] Respondent's Brief (filed October 22, 2004) at 1.

that respondent is relying on K.S.A. 44-508(f), commonly referred to as the "going and coming" rule. Respondent also contends claimant's failure to wear a seatbelt bars his claim for workers compensation benefits under K.S.A. 44-501(d)(1). Finally, respondent requests the Board modify the Order or remand this issue to the ALJ for clarification as to the extent of its responsibility for the medical bills and treatment. Respondent maintains the ALJ exceeded his jurisdiction in ordering a physician to treat claimant without designating the appropriate treatment that is considered to be authorized. Similarly, respondent believes the ALJ's order that "all" medical bills should be paid exceeds his authority and that the ALJ should be compelled to designate what bills should be ordered paid.

Claimant responds by first pointing out that respondent failed to assert the "going and coming" defense during the course of the preliminary hearing. Thus, its assertion now, while on appeal, is untimely. Claimant next contends that respondent failed to prove those facts necessary to predicate a defense based upon K.S.A. 44-501(d)(1). Therefore, claimant requests the Board affirm the ALJ's Order in all respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Claimant is (or was) the owner/sole proprietor of respondent, an insurance agency. On June 22, 2000, claimant was driving from his home to a client's location in Elbing, Kansas for purposes of making an insurance presentation. Claimant testified that he would routinely leave from his home and drive directly to a customer's location when making such presentations. While on his way, claimant was involved in a rather serious automobile accident. He was injured in the accident and transported to a local hospital where he remained for over 100 days.

Claimant received a significant amount of medical treatment in the four years since that accident. Indeed, during the preliminary hearing the respondent offered 557 pages of medical records in addition to those offered by claimant. According to claimant, this treatment was paid for by the workers compensation carrier. It is only now, when the issue of treatment for his knees is disputed, that the issues of compensability and causation have emerged.

According to claimant, he has made repeated references to both his knees since his accident, but recently the pain and discomfort have become increasingly intolerable. While he admits having a catch in his left knee before the accident, his present complaints in both knees are, in his view, attributable to his June 2000 accident.[3]

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[3] P.H. Trans. at 17.

Claimant remembers nothing about the collision itself. He was driving a 1999 Lincoln Town Car, equipped with air bags and seatbelts. Claimant cannot recall whether he was wearing a seatbelt at the moment of the collision although, he testified that he makes it a habit to do so.[4] He further testified that he "always" wears a seatbelt.[5] Captain Don Currier, the officer who investigated the accident, indicated that it was "unknown" whether claimant was wearing a seatbelt at the time of the accident.[6] He testified that he recalled finding claimant at the scene "entrapped" in the vehicle.[7]

Respondent contends the records of Wesley Medical Center "serve as the court's only substantial competent evidence on the issue of whether the claimant was or was not wearing a seatbelt at the time of his injury."[8] According to the medical records, somehow, someone got the impression that claimant was unrestrained in the accident. How that "fact" came to be established is unexplained as neither the claimant nor the investigating officer know that to be the case.

Respondent also contends that the medical records fail to disclose the ongoing bilateral knee complaints as represented by the claimant. One of the pain diagrams completed by claimant on October 2, 2001 reflect pain complaints in the left knee.[9] Respondent argues the balance of the records reveal no complaints to the right leg until April 2004. However, a cursory review of the records attached to the preliminary hearing request identified at least one report, authored by Dr. Shane T. Fejfar, on December 15, 2003, during which he describes claimant's "chief complaint of right knee pain".

At the preliminary hearing, claimant sought medical treatment for both his knees, in particular, surgery on the right, as well as temporary total disability benefits in the event the physician took him off work. He also requested that Dr. Fejfar be designated the treating physician. In support of his request, claimant testified to the existence of the accident and how it was that he came to be in his car and the purpose of his trip. Because he recalls nothing about the accident itself, the deposition of Captain Currier was taken to speak to the issue of the seatbelt.

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[4] *Id.* at 8.

[5] *Id.* at 13.

[6] Currier Depo. at 12.

[7] *Id.* at 9.

[8] Respondent's Brief (filed October 22, 2004) at 2.

[9] P.H. Trans. at 20.

At the outset, claimant asserts the Board does not have jurisdiction to consider this appeal as the only real issue decided by the ALJ was that of claimant's entitlement to medical compensation and temporary total disability benefits. The Board disagrees. Upon reviewing the transcript of the preliminary hearing as well as the brief to the Board, it is clear that respondent contends that K.S.A. 44-501(d)(1), bars claimant's claim for benefits. That assertion gives rise to jurisdiction.

K.S.A. 44-534a restricts the jurisdiction of the Board to consider appeals from preliminary hearing orders to the following issues:

(1) Whether the employee suffered an accidental injury;

(2) Whether the injury arose out of and in the course of the employee's employment;

(3) Whether notice is given or claim timely made;

(4) Whether certain defenses apply.

These issues are considered jurisdictional and subject to review by the Board upon appeals from preliminary hearing orders. The Board can also review a preliminary hearing order entered by an administrative law judge if it is alleged the administrative law judge exceeded his or her jurisdiction in granting or denying the relief requested.[10]

The term "certain defenses" refers to defenses which dispute the compensability of the injury under the Workers Compensation Act. In *Carpenter*,[11] the Court held:

> The term "certain defenses" in K.S.A. 1998 Supp. 44-534a refers to defenses subject to review by the Workers Compensation Board only if they dispute the compensability of the injury under the Workers Compensation Act. (Syllabus ¶ 3.)
>
> Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.[12]

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[10] K.S.A. 1999 Supp. 44-551(b)(2)(A).

[11] *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

[12] *Allen v. Craig*, 1 Kan. App. 2d 301, 303-304, 564 P.2d 552, *rev. denied* 221 Kan. 757 (1977).

The Board finds respondent's assertion of the protections afforded by K.S.A. 44-501(d)(1) constitutes a "certain defense". Thus, the Board has jurisdiction to consider this matter at the preliminary hearing stage.

K.S.A. 44-501(d)(1) provides:

> If the injury to the employee results from the employee's deliberate intention to cause such injury; or from the employee's willful failure to use a guard or protection against accident required pursuant to any statute and provided for the employee, or a reasonable and proper guard and protection voluntarily furnished the employee by the employer, any compensation in respect to that injury shall be disallowed.

The foregoing statute is supplemented by K.A.R. 51-20-1 which provides:

> **Failure of employee to use safety guards provided by employer.** The director rules that where the rules regarding safety have generally been disregarded by employees and not rigidly enforced by the employer, violation of such rule will not prejudice an injured employee's right to compensation.

As previously noted, the administrative regulation promulgated to implement the requirements of K.S.A. 44-501(d) mandates that when safety rules are generally disregarded by employees and not rigidly enforced by the employer, violation of the rules will not prejudice an injured employee's right to compensation.

Here, respondent appears to contend that the safety belt contained within the claimant's vehicle constitutes a "safety device" and that claimant willfully failed to use it, as required by statute. In support of this contention, respondent points to the claimant's inability to state that he actually had the seatbelt on before the collision, the investigating officer's statement that it was "unknown" whether claimant had worn a seatbelt, as well as the "uncontroverted" medical records which recite that claimant was "unrestrained" in the vehicular accident.

The Board concludes that, under the facts of this case, the statute does not relieve respondent of liability. First, in spite of respondent's strident contentions, the record, as presently developed, does not establish it is more probably true than not that claimant did not have a seatbelt on and was unrestrained in the accident. Claimant testified that he makes it a habit to wear his seatbelt and that, although he cannot remember the accident itself, there is no reason he would not wear a seatbelt. When the investigating officer reported to the scene, he recalled finding claimant trapped in his car. While he may have been trapped due to the mangled nature of his vehicle, it seems just as possible that he was trapped due to the seatbelt that restrained him. While the hospital records indicate claimant was unrestrained, it is difficult, if not impossible, based upon this record, to know how it is that anyone might know that fact.

Second, there is an absence of evidence as to the willful nature of claimant's conduct. He testified that his company had no policy about wearing seatbelts, but that it was his personal habit to wear one when driving. Assuming he did not have it on, there is no evidence in this record to suggest that his failure to do so was anything more than negligent.

For these reasons, the Board concludes that the necessary element of the statute, specifically that claimant willfully failed to wear a seatbelt, has not been met. Therefore, the statute does not relieve respondent from its liability. Thus, to the extent the ALJ concluded the statute was inapplicable and did not bar claimant's request for benefits, that portion of the Order is affirmed.

As for respondent's alternative defense, that of underlying compensability of claimant's accident based upon the "going and coming" rule, the Board finds this argument is not appropriately before the Board. Shortly after the commencement of the hearing, the ALJ inquired of respondent "[i]s compensability an issue?" to which respondent's counsel replied "[i]t is, judge."[13] Unfortunately, this is the first and only indication in the transcript that respondent was contesting the compensability of claimant's accident based upon the "going and coming" rule until respondent filed its brief with the Board for purposes of this appeal.

Quite clearly, respondent failed to present its "going and coming" argument to the ALJ and only belately seeks to assert the argument on appeal. Issues not raised before the ALJ cannot be raised for the first time on appeal. To hold otherwise would place the Board in the position of attempting to decide an issue based upon an incomplete record, and would deny claimant the benefit of evidence that may have been presented if he had been aware that there was a dispute as to such issue at preliminary hearing.[14] Accordingly, the Board rejects this argument and affirms the ALJ's conclusion that claimant sustained an injury arising out of and in the course of his employment with the respondent.

The last issue, that relating to the medical bills and the ordering of treatment, is not an issue which the Board has jurisdiction over at this stage of the proceedings. As explained above, the Board has limited jurisdiction to hear appeals from preliminary hearing orders. The respondent seems to suggest that the wording employed by the ALJ effectively exceeded his jurisdiction primarily because the claimant is elderly and somehow, by indicating that "all" medical bills should be paid, suggests that respondent is now required to pay for all his medical care, even that unrelated to the underlying accident and due to his "elderly gentlemen" status. The Board disagrees.

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[13] P.H. Trans. at 9.

[14] See *Scammahorn v. Gibraltar Savings & Loan Assn.*, 197 Kan. 410, 416 P.2d 771 (1966).

The ALJ has exclusive authority at a preliminary hearing to order medical treatment and the payment of bills that are attributable to the accident. To the extent there is a dispute stemming from any given medical bill or treatment procedure and whether it is causally related to the claimant's accident and resulting injuries, respondent can avail itself of the appropriate statutory procedure to have that issue addressed by the ALJ.

The ALJ's preliminary hearing Order is, therefore, affirmed with respect to compensability issues and the balance of respondent's appeal is hereby dismissed for lack of jurisdiction.

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge John D. Clark dated September 13, 2004, is affirmed in part and dismissed for lack of jurisdiction.

IT IS SO ORDERED.

Dated this _____ day of November 2004.

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BOARD MEMBER

c: Kelly W. Johnston, Attorney for Claimant
Donald J. Fritschie, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director